No. 95-1649

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

State of Kansas, *Petitioner*,

v.

Leroy Hendricks, *Respondent.*

On Petition For Writ Of Certiorari
To The Kansas Supreme Court

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Kansas Sexually Violent Predator Act, Kan. Stat. Ann. § 59-29a01 et seq. -- which provides for the civil commitment and long-term care and treatment of those who are found beyond a reasonable doubt both (1) to be suffering form a mental abnormality that has resulted in the commission of a sexually violent offense and (2) to present a continuing danger to society through a likelihood of repeating such offenses -- violate substantive due process principles?

2. What level of constitutional scrutiny applies to a claim that civil confinement of a sexually violent predator for care and treatment deprives him of a liberty interest in violation of substantive due process principles?

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Leroy Hendricks, *Respondent.*

Brief in Opposition

The Respondent, Leroy Hendricks, respectfully requests that the Court deny the petition for a writ of certiorari filed by the State of Kansas seeking review of the March 1, 1996 decision of the Kansas Supreme Court holding that the Kansas Sexually Violent Predator Act violates substantive due process principles. The case will be reported at 912 P.2d 129.

STATEMENT OF THE CASE

The 1984 Plea Agreement

In 1984, Respondent Leroy Hendricks was charged with three counts of indecent liberties with a child, arising out an incident in which he allegedly fondled three thirteen year old boys who came into the electronics store in which he worked. Each charge carried a possible penalty

of five to twenty years imprisonment. R. App. 10a,[1] K.S.A. 21-3503, 21-4501(c). In addition, because Respondent had previously been convicted of criminal offenses, these sentences could have been tripled under the State's habitual offender law. R. App. 10a, K.S.A. 21-4504(b). Respondent was thus subject to a possible maximum sentence of 45 to 180 years.

The State chose to seek neither the maximum sentence nor to enhance the sentence. Instead, it entered into a plea bargain with the Respondent in which it agreed to dismiss one of the counts, not seek an enhanced sentence under the habitual criminal offender act and to recommend a controlling sentence of five to twenty years, to be served concurrently, on Respondent's guilty pleas.[2] Respondent entered a plea based upon the bargain, and the court imposed the agreed-upon sentence. Pet. App. 16a, 17a.[3] The result was that Respondent was eligible for parole in three years and would be required to be released, if he earned all possible good time credits, in ten years. R. App. 13a, 14a. K.S.A. 22-3717(a)(c)(1), 22-3718.

In addition to agreeing to this bargain, the State made no allegation at the time that Respondent was suffering from an mental illness, or indeed, from any illness needing psychological treatment, and it failed to move either for civil commitment or to seek Respondent's commitment, as a part of his criminal sentence, to a state psychiatric hospital "for psychiatric care and treatment."[4]

Respondent served his sentence without incident. He did not present any behavioral problems. He engaged in no predatory acts, sexual or otherwise. He earned all of his good time possible, and he was scheduled to be released from confinement, at the expiration of his

[1] R. App. Refers to the Respondent's appendix attached to this brief in opposition.
[2] There is no explanation in the record for the State's reasoning in making such an agreement with the Respondent.
[3] Pet. App. Refers to the appendix attached to the State's Petition.

sentence, on September 11, 1994. (R. Vol. 8 pp. 12-25)[5] Respondent would have been 60 years old sixteen days after the date of his projected release. (R. Vol. 14 p. 204)

THE KANSAS SEXUALLY VIOLENT PREDATOR ACT

In the summer prior to Respondent's release, the Kansas Legislature passed a number of measures in an effort to lengthen the terms of individuals convicted of sexual offenses. The legislature doubled the penalties for certain violent offenders. 1994 Kan. Sess. Laws, Ch. 252. In addition, the legislature passed a statute permitting a sentence departure for a criminal defendant designated as a "predatory sex offender." The enhancement provision defines predator sex offender as an individual who has been convicted of a crime of extreme sexual violence and who "suffers from a mental condition or personality disorder which makes the offender likely to engage in additional acts" constituting sexual crimes. R. App. 15a, K.S.A. 21-4716.[6]

While these acts permitted additional incarceration of individuals who might commit crimes in the future, they could not deal with public concern over individuals already incarcerated for sex offenses who might be released. The legislature *was* urged to extend the period of incarceration for such individuals, and it responded by passing the Sexually Violent Predator Act. Pet. App. 25a Modeled after a similar statute passed in Washington State in 1992,

[4] Kansas statutes also provide for mental evaluation and treatment, including commitment to a state psychiatric hospital, for a period not to exceed the maximum term of imprisonment allowed. App 12a,13a, K.S.A. 22-3429, 22-3430 and 22-3431.
[5] R. Vol. Refers to the volume of the record on appeal which is filed with the Kansas Supreme Court.
[6] Before the 1994 legislative session, a young woman had been raped and murdered by a person shortly after his release from prison. Her parents, law enforcement officers, parole and probation officers and a group of legislators formed an ad hoc Sexual Offender Task Force. No mental health professionals were involved. The task force presented emotional testimony before the Senate Judiciary Committee urging the legislature to not stop with harsher punishment for persons who committed new crimes, but to also keep those already in prison incarcerated for a longer time. That goal was exemplified by the remarks of the current Attorney General when she said, "We cannot

the Act creates "civil commitment" for individuals the legislature deems dangerous but not mentally ill. Pet. App 17a. The legislation begins with a "finding" that a "small but extremely dangerous group" of "predators" exist who do not have a mental defect or disease rendering them appropriate for involuntary treatment pursuant to the existing involuntary treatment statute. According to these findings, these individuals, who must either be serving sentences after conviction of sex crimes, or incarcerated pursuant to insanity acquittal commitments or incompetency proceedings, have "antisocial personality features" unamenable to existing mental treatment modalities and are likely to engage in future acts of sexual violence. Moreover the prognosis for rehabilitating such offenders is "poor" and the treatment needs of these individuals are "very long term." R. App. 1a, K.S.A. 59-29a01.

The statute defines "sexually violent predator" as:

> any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.[7]

The Act in turn defines "mental abnormality" as:

> a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others. R. App. 1a, K.S.A. 59-29a02(b).

The Act also sets forth a number of procedural requirements. A petition to declare a person a sexually violent predator may be filed prior to an individual's release from "total confinement' from a sentence for a sexually violent offense. For such individuals, this Act does not provide, or permit, commitment as an alternative to the individual's criminal sentence, but as an addition to it. Pet. App. 64a-66a, K.S.A. 59-29a03, 59-29a04.

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open our prison doors and let these animals back into our communities." The testimony barely touched on the matter of treatment. Pet. App. 25a, (R. Vol. 4 pp. 255, 256)

If the court determines that probable cause exists, the individual is entitled to a jury trial. R. App. 3a, K.S.A. 59-29a06. If the individual is determined to be a sexual predator, the person is committed to state custody, segregated from other persons committed for care and treatment because of mental illness. The Act does not provide for those committed the same privileges granted other individuals in the State subject to civil commitment. R. App. 3a , K.S.A. 59-29a07.

Unlike other civil committees, who can be released upon a finding of the head of the treatment facility, an individual committed under the sexually dangerous predator act may only be released upon court order. Each individual committed under the Act is entitled to an "annual review", with a right to a trial if the court decides that there is "probable cause" that the inmate's mental abnormality or personality disorder has so changed that the person is safe to be at large and will not engage in acts of sexual violence. A trial must also be held if the Secretary of the Department of Social and Rehabilitative Services determines that the inmate's mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence. R. App. 5a, K.S.A. 59-29a08. While the committed individual is permitted to petition for release at any time, absent a determination of probable cause by the court, or a petition by the SRS, there is no right to an in-person hearing. See K.S.A. 59-29a08, 29a10, R. App. 5a, 6a.

THE COMMITMENT PROCEEDINGS IN THIS CASE

At the commitment trial, the State began its case by calling Respondent to testify. Mr. Hendricks outlined his family background, (R. Vol. 14 pp. 205-209) as well as his previous

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[7] As noted by Petitioner, this section was amended in 1995 to add the words, "if not confined in a secure facility" at

sexual offenses against children. (R. Vol. 14 pp. 209-247) He stated that during his latest incarceration. he had received no treatment for any sexual disorder. (R. Vol. 14 pp. 254, 255) He stated that he had not had any urge to have sexual contact with children since 1985, (R. Vol. 14 p.261) and that he was aware that were he to reoffend, he would spend the rest of his life in prison. (R. Vol. 14 p. 261) He acknowledged however, that he was a "pedophile" and while he hoped that he would not reoffend the only way he could "guarantee" that he would never reoffend was to die. (R. Vol. 14 p. 264)

Dr. Charles Befort, the chief psychologist at Larned State Hospital, testified for the State. He stated that Respondent was not mentally ill, nor was he suffering from a personality disorder. (R. Vol. 14 pp. 367, 368) He also stated that the term "mental abnormality" was not a proper diagnostic term. He also acknowledged that the term "mental abnormality" was circular, in that the behavior—predisposition to commit sex crimes—was used both to determine the condition and predict the behavior. (R. Vol.14 p. 374) He did identify Mr. Hendricks as a pedophile and stated his belief that Respondent would engage either in acts of sexual violence or sex acts with children if permitted to do so. (R. Vol. 14 p. 357)

Following the finding that he was a sexual predator, the Respondent was committed to Larned State Security Hospital. In February, 1995 he was moved to the Larned Correctional Mental Health Facility, which is a facility maintained by the State Department of Corrections. Dr. Befort, now the acting Clinical Director of the Sexual Predator Treatment program, testified in a subsequent state habeas corpus hearing that persons committed under the Act were not receiving any treatment. Indeed, Dr. Befort testified that he did not feel fully qualified to head a sexual predator treatment program. R. App. 20a. Dr. Befort stated that the

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the end of this phrase.

primary contact he had with Respondent and others committed under the Act was in a group session that he attempted when his schedule permitted He said that the focus of the sessions was the lack of treatment and that there was little if any discussion of the sexual deviancy issues which had lead to the commitments. R. App. 28a. Dr. Befort concluded that the Respondent and the other persons committed under the Act had received virtually no treatment. R. App. 20a,21a.

THE DECISION OF THE KANSAS SUPREME COURT

Respondent appealed his adjudication, arguing that the Sexually Violent Predator Act was punitive in purpose and effect, and that its application to the Respondent violated both the ex post facto clause of the Constitution and the prohibition against double jeopardy. Respondent also argued that the unexplained differences between the "treatment" afforded individuals committed under the sexual predator act and all other civilly committed individuals violated equal protection of the law. In addition, Respondent argued that the statute, by permitting indefinite incarceration without a finding that the individual was both mentally ill and dangerous, violated substantive due process. The Kansas Supreme Court, in a 4-3 decision, agreed with the last of these assertions, and invalidated the statute as violating substantive due process The Court did not reach the other constitutional arguments raised by Respondent.

The majority opinion[8] exhaustively reviewed the record in this case, the language and history of the statute, and the language of related commitment provisions in Kansas. The Court concluded that the Sexually Violent Predator Act authorizes the confinement of individuals

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[8] Petitioner incorrectly states that the opinion of the Court was specifically joined by only three members of the seven member court. In fact, the concurring opinion explicitly states, "I will set out my reasoning for joining Justice Allegrucci's majority opinion." Pet. App. 20a, 21a.

"upon a showing of dangerousness without a finding of mental illness." Pet. App. 20a. In reaching this conclusion, the court relied, in part, on the fact that the statute did not require a finding that the Respondent was suffering from a mental illness as defined by the Kansas civil commitment statutes. But, contrary to Petitioner's implications, the Court did not rest its conclusion solely upon that observation. Instead, the Court also relied upon the testimony of the State's own expert, who testified at the commitment proceeding that Respondent was not mentally ill, Pet. App. 20a, upon the stated legislative purpose of the Act, which the Court found to be "to continue the segregation of sexually violent offenders from the public" and from the record in this case, that "treatment for sexually violent predators is all but nonexistent." Pet. App. 15a.

In deciding whether confinement under these circumstances was compatible with due process, the Court turned for guidance to this Court's decision in Foucha v. Louisiana, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). In Foucha, this Court struck down Louisiana's attempt to hold indefinitely an individual acquitted by reason of insanity who, although having recovered his sanity, was found to have "an antisocial personality that sometimes leads to aggressive conduct." Justice White, writing for this Court, stated that Foucha could not be held indefinitely merely for having an antisocial personality disorder and being dangerous, that to permit such confinement would be "a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated the criminal law." 504 U.S. at 82-83

Applying this language, the majority held the preventive detention authorized by the Sexually Violent Predator Act to violate substantive due process. The majority determined that

the Act's attempt to confine an individual not mentally ill, but suffering a "mental abnormality" was no more permissible than Louisiana's attempt to confine an individual not mentally ill, but suffering from an "antisocial personality". The Court reached this conclusion not only because the term "mental abnormality" is not a recognized diagnostic term in the medical community, but because the State's own witness conceded that the term is circular, and most important, because the term is broad enough to apply to any individual who is predisposed to commit sex crimes. Pet. App. 19a.

REASONS FOR DENYING THE WRIT

I. The Court Should Await Further Interpretation in the State Courts of These Novel Statutes.

We agree with Petitioner that the Kansas Sexual Predator Act, providing for potential lifetime incarceration of individuals based upon a determination that they are likely to commit sex crimes in the future, presents important constitutional issues. Nevertheless, there are several compelling reasons that counsel against hearing this case.

First, as Petitioner notes, the Kansas Sexually Violent Predator Act and the few similar statutes that have been passed in four other states, are very recent enactments. Litigation interpreting these acts is just beginning to develop the important constitutional issues raised by these statutes. Thus, the California Sexually Violent Predators Act (Cal. Welfare & Ins. Code Ann. §6600, et. seq.) (West Supp. 1996) has not been the subject of a published opinion. The constitutionality of the Minnesota statute has not yet been decided by the Minnesota Supreme Court. See In re Linehan, 544 N.W.2d 308 (Minn. Ct. App. 1996). While the Supreme Court of Wisconsin has upheld the constitutionality of its statute on its face in the context of a motion to dismiss, the Court has not yet considered the Statute in the context of a

case that has proceeded through adjudication. State v. Carpenter, 541 N.W.2d 105 (Wis. 1995); State v Post. 541 N.W.2d 115 (1995). It is, of course, quite possible that the court will reevaluate the constitutional issues in that case when presented, as in Hendricks, with an actual adjudication. Finally, the litigation concerning the constitutionality of the Washington Sexual Predator Act, recently declared unconstitutional by a federal district court, is currently pending in the United States Court of Appeals for the Ninth Circuit. See Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995), on appeal, No. 95-35958 (9th Cir.) (argued Mar. 7, 1996). Because the significant issues raised by this case are just beginning their development in the lower courts, we urge this Court to await further development of the issues presented.[9]

This course is particularly appropriate since resolution of the single issue presented by Petitioner- -whether the Kansas Sexually Violent Predator Act violates substantive due process—will not begin to provide a clear answer to the serious constitutional questions raised by this and similar statutes. Like the similar Sexually Violent Predator Statute passed in Washington, the Kansas Sexually Violent Predator Act has been challenged as violating the Constitution's prohibition against ex post facto laws and for violating the Fifth Amendment's prohibition against double jeopardy. In Young v. Weston, supra, the court found the Washington Act constitutionally deficient in both respects. This conclusion was contrary to the conclusion reached by the Washington Supreme Court, In re Young, 857 P.2d 989 (Wash. 1993) and to the Wisconsin Supreme Court in State v Carpenter, 541 N.W.2d 105 (1995).

[9] While the Kansas Act is modeled after the Washington statutes, Rev. Code Wash. 71.09.010 et. seq., the other recent sexual predator statutes contain differences in language and procedure that may be relevant to determination of their constitutionality. Cal. Welfare &Ins. Code Ann. Sec. 6600, et. seq.; Wis. Stat. Ann. 975.001 et. seq. and 980.001 et. seq. ; Minn. Stat. Ann.253B.01 et. seq.

Thus, any serious effort to answer whether the Kansas Act is constitutional must address the ex post facto and double jeopardy concerns, as well as substantive due process.[10]

To put it mildly, the questions concerning whether the Act violates ex post facto and double jeopardy are at least as vexing and in need of resolution as the issue of substantive due process. While the courts have, in resolving the substantive due process issue, been guided by this Court's decision in Foucha, supra, and Addington v. Texas 441 U.S. 418, 99 S. Ct. 1804, 60 L.Ed.2d 323 (1979), this Court has yet to address the precise question of how to determine, for purposes of the ex post facto clause, whether a law is criminal or penal. See Young v. Weston, 898 F. Supp. at 751.

Thus, the Court in Young v. Weston relied upon analogous cases involving whether, for Fifth or Sixth Amendment purposes, a statute was penal or regulatory, to determine that the statute constituted a criminal penalty. As the court found, although the label attached to the statute is "civil", in purpose and effect, the Violent Predator Statute is a criminal enactment. Among the important considerations cited by the court were that: 1)the commitment statute only applies to individuals convicted of a sex crime or who have been charged with a crime but found incompetent to stand trial or not guilty by reason of insanity; 2)that the statute promotes traditional aims of punishment—retribution and deterrence—in that while it purports to concern itself with treatment, the statute insists that the treatment not occur until the inmate has fully served the sentence of imprisonment for the conduct that serves as the basis for the finding of the individual's mental abnormality; and 3) that the statute was promoted as a means of

[10] As noted, the Kansas Supreme Court, having found that the Act violates substantive due process, declined to reach the merits of these issues. However, if the Court believes that the extreme public importance of the constitutionality of this statute, and the sharp split in authority concerning the issues warrants review, (see Petition for Certiorari at 14), the Court should also undertake to decide the ex post facto, double jeopardy and equal the -

keeping convicted criminals in prison beyond the length of their sentence, and that release is far more difficult to obtain under these statutes than under traditional civil commitment statutes.[11] For similar reasons, the court in Young v. Weston found Washington's Sexual Predator Act to violate the Fifth Amendment's prohibition against double jeopardy Again, this determination has explicitly divided the courts, and if certiorari is to be granted, the Court should endeavor to determine that issue as well.

The Court should decline to review this statute for the additional reason that the Kansas Legislature has already amended its civil commitment laws in a way that, in the future, may alter the determination of the issue presented by Petitioner. Petitioner argues that the Kansas Supreme Court "held that the Act violates the substantive due process standard of Foucha because it permits commitment of persons who suffer from a dangerous "mental abnormality" that, while specifically defined in the Act does not fall within the definition of "mental illness" in the traditional Kansas civil commitment statute." Pet at 8-9. Senate Bill 469, which was signed by the Governor on April 14, 1996, defines as a "mentally ill person" any individual suffering from a "mental condition that has resulted in the commission of an act that would constitute a sexually violent offense," and provides for the civil commitment of such a person "who presents a continuing threat of harm to self or others." See S.B. 469, Sec 2(e) (1) (B), (f) (B). The bill, with some modifications, also removes the unique distinctions in procedure between civilly committed individuals and sexually violent predators. Because Kansas has amended its statute, and because individuals considered sexually violent predators can expected to be proceeded

protection challenges. For that reason, Respondent has filed, along with this response, a conditional cross-petition for certiorari raising these questions.

[11] An additional reason, not present in Washington, to consider the Kansas Sexual Predator Act a criminal statute is that the identical condition, a mental abnormality predisposing the individual toward repeated criminal behavior, is

against under this new statute, a review by this Court of the Kansas Supreme Court's decision may be of limited value.

II. The Kansas Supreme Court Correctly Applied This Court's Decision in Foucha v. Louisiana.

In its decision that the Sexually Violent Predator Act violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution, the Kansas Supreme Court relied upon Foucha v. Louisiana, supra. in which this court clearly held that to indefinitely confine as dangerous one who has a personality disorder or antisocial personality but is not mentally ill, is constitutionally impermissible. Foucha, 504 U.S. at 78. Similarly, the Kansas Supreme Court found that the state sex predator statute unconstitutional, based on Foucha, holding that "to indefinitely confine as dangerous one who has a mental abnormality is constitutionally impermissible." Hendricks, Pet. App. 19a.

The Petitioner seeks review of the Kansas Supreme Court's decision interpreting its own statute for two reasons. First, the State claims that this court's decision in Foucha is unclear as to whether strict scrutiny should be applied in the review of a statute which deprives individuals of their liberty. Second, the state argues that the State of Kansas inappropriately applied this Court's decision in Foucha when deciding that the state sexual predator statute unconstitutionally confined persons on the basis of mental "abnormality". While Respondent agrees that the Kansas Supreme Court relied heavily on this Court's opinion in Foucha in interpreting its state statute, it does not agree that the petition for certiorari should be granted in a case in which the Kansas Supreme Court correctly interpreted a state statute under well known principles of constitutional law set forth repeatedly by this Court.

basis for an upward departure in a criminal case under the Kansas Sentencing Guidelines. See

A. Strict scrutiny is the appropriate standard to judge the Kansas Sexual Predator Act.

Petitioner asks this court to set aside the Kansas Supreme Court's interpretation of the Kansas Sexual Predator Act, claiming that the test for interpreting whether a state statue deprives a person of liberty under the due process clause of the Fourteenth Amendment of the United States is unclear. However, a review of this court's decisions holing that liberty is a fundamental right belies the State's claim that the test is anything but strict scrutiny.

This court has repeatedly stated that an individual's liberty is fundamental in nature. See United States v. Salerno, 481 U.S. 739, 750, 107 S. Ct. 2095, 2103, 95 L. Ed. 2d 697 (1987). [I]ncarceration of persons is.. one of the most feared instruments of state oppression and freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments..." Foucha v. Louisiana, 504 U.S. 71, 90, 112, S. Ct. 1780, 1791, 118 L. Ed. 2d 437 (1992) (Kennedy, J., dissenting). Physical confinement in a mental institution entails a "massive curtailment of liberty". Vitek v. Jones, 445 U.S. 480, 491-92, 100 S. Ct. 1254, 1262-63, 63 L. Ed. 2d 552 (1980). In order to pass strict scrutiny, the challenged state interest must be narrowly tailored to serve that interest. Roe v. Wade, 410 U.S. 113, 155, 93, S. Ct. 705, 727-28, 35 L. Ed. 2d 147 (1973). This fundamental right to liberty is threatened by the Kansas Sexual Predator Act, K.S.A. 59-29a01 et. seq.

Contrary to the petitioner's claim that there is confusion among the courts as to the appropriate test for deciding whether a deprivation of liberty violates due process of law, not one court decision regarding the constitutionality of the various sexual predator statutes disputes that the test is anything but strict scrutiny. All the court opinions, both majority and dissenting,

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K.S.A.214716(b)(1)(G), App. 15a.

presume that review of such a statute is strict scrutiny. Hendricks, Pet. App. 35a., Matter of Linehan, 544 N.W. 2d 308, 316-317 (Minn. App. 1996), Young v. Weston, 898 F. Supp. 744, 748 (W. D. Wash. 1995), In Re Young, 122 Wash. 2d 1, 857 P. 2d 989, 1000(Durham, J.) and 1019 (Johnson, J., dissenting)(1993), State v. Post, 197 Wis 279, 641 N.W. 2d 115, 122 (Geske, J.)and 142, 146 (Abrahamson, J., dissenting)(1995).

Finally, the State never contended in its argument to the Kansas Supreme Court that the standard for analyzing the constitutionality of the sexual predator statute was anything but strict scrutiny. Having failed to challenge the strict scrutiny test below, the State cannot now complain that it is unclear or even wrong. There being no dispute on this issue among the various court decisions, or, for that matter between the parties, this court should deny the request for certiorari on this basis.

B. The Kansas Court correctly applied the substantive due process principles applicable to the commitment of dangerous individuals.

The Petitioner's second basis for requesting review must also fail. The State claims Foucha did not codify a set of rules for state's power to confine the mentally ill. It is true, of course, that Foucha did not attempt to codify in a rigid way any particular definition of the degree of mental illness necessary to support a civil commitment. What is clear, we submit, is that Foucha stands for the position that a permissible long-term and non-criminal confinement of a dangerous individual must have a basis more substantial than an amorphous "condition" predisposing an individual to commit future crimes, and that the Kansas Supreme Court correctly held that the sex predator statute passed by its legislature failed to measure up to this standard.

Contrary to the Petitioner's claim that the states are completely free to decide what type of abnormality" requires confinement, this court in Foucha clearly set forth the limits of such

preventive detention. In Foucha, Louisiana permitted the continued commitment of an insanity acquittee who was no longer mentally ill, but perceived to be dangerous based on his anti-social personality disorder, "a condition that is not a mental disease and ...is untreatable". Foucha, 504 U.S. at 75. Justice White's opinion found that continued commitment could not be based on dangerousness alone. Foucha 504 U.S. at 82, 83. Justice White, writing for the majority of the Court , went on to say:

> "The State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is not effective treatment, he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law." Foucha 504 U.S. at 82, 83 (emphasis added).

The Kansas Supreme Court correctly held that the Kansas Sexual Predator Act, K.S.A. 59-29a01,et seq. permits precisely what the court in Foucha forbids. It allows the state to hold indefinitely a person convicted of a crime who is not mentally ill but can be shown to have an abnormality that may lead to criminal conduct. Thus, the court noted that, as in Foucha, the state seeks to confine indefinitely people who could not be civilly committed under the constitutional standard for civil commitment. Indeed, the Kansas Act states that it is seeking to incarcerate people who are not mentally ill.

K.S.A. 59-29a01 provides, in part:

> "The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et. seq." .R. App. 1a, (emphasis added)

The Kansas Supreme Court found that treatment of such offenders and the goal of reintegrating them into society was incidental, at best. Hendricks, Pet. App.15a.

It should be noted that the petitioner does not even attempt to justify commitment based on antisocial personality disorder because Foucha found that an insanity acquittee with a diagnosed antisocial personality disorder could not be confined as mentally ill. Foucha, 504 U.S. at 77-83.

The Kansas Supreme Court also correctly concluded that the state's use of the term "mental abnormality" did not render this statute constitutional. Under section (a) of K.S.A. 59-29a02, R. App. 1a, a sexually violent predator means "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." (emphasis added). This definition in much broader that the concept of mental illness, as defined by Foucha and the cases cited above.

In fact, the definitional section makes clear that the term "mental abnormality" so broadens the concept of mental illness so as to render it meaningless. As noted by the Kansas Supreme Court, even the state's principal witness, Charles Befort, chief psychologist at Lamed State Security Hospital, testified that the term "mental abnormality" is a phrase used by clinicians to discuss abnormality or deviance, but that it is not a diagnosis or even defined in the DSM-III-R. Hendricks, Pet. App.18a, 19a.

The statutory definition of the term "mental abnormality" is circular at best and the Kansas Supreme Court so found. The term "mental abnormality" is defined in K.S.A. 59a02(b) as: "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexual violent offenses in a degree constituting such person a menace to the health and safety of others." A "mental abnormality" is a mental condition that

makes it likely that a person will commit sexually violent offenses. A mental abnormality is now a "mental condition". This definition is so broad it could conceivably include any collection of thought or ideas from which derives an impulse to act in a sexually inappropriate manner. The pathology is derived from the act itself, so that, if one commits the act, one is mentally ill enough to be committed. As the Kansas Supreme Court correctly concluded, the definition of "mental abnormality" is circular and has no clinical significance. Stated otherwise, as Judge Abrahamson noted in her dissenting opinion in State v. Post, 541 N. W. 2d at 143:

> "[A] "mental disorder" is defined in chapter 980 not in terms of mental illness, mental disease or mental defect but in terms of a predisposition to sexual crimes. Under chapter 980 "mental disorder" is "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence: Wis State. Sec. 980.01(2). Since every condition is necessarily either congenital or acquired, and since "emotional volitional capacity" simply describes the decision-making processes affecting how people act, mental disorder under chapter 980 means no more that a predisposition to engage in acts of sexual violence. Thus chapter 980 attempts to create a mental disorder authorizing lifetime commitment based not on mental illness but on past crimes for which the prospective committee has already served the prescribed sentence."

That a mental illness or the term "mental abnormality" may be defined in more than one way hardly suggests that mental illness can be defined howsoever the state pleases, as the Petitioner suggests. "If the constitutionally prescribed threshold of mental illness has no core meaning and can mean everything, then it means nothing." Post, at142 (Abrahamson, J., dissenting). We submit that the narrowest reading of Foucha supports the conclusion that states are not free to define all dangerous persons as mentally ill and thereby commit them to mental hospitals for their lifetime.

In the present case, the Petitioner is trying to broaden the definition of mental illness beyond that which this Court has held a commitment can be based. This court's decision in Foucha is clear, however, that detention of persons who are not mentally ill violates due process

of law under the Fourteenth Amendment. The Kansas Supreme Court reliance on Foucha was correct and certiorari should not be granted on this claim.

CONCLUSION

For the foregoing reasons, the Respondent requests that the Court deny the Issuance of a Writ of Certiorari and allow the issuance of the mandate of the Kansas Supreme Court in this matter.

Respectfully submitted,

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APPENDIX A

Kansas Sexually Violent Predator Act

K.S.A. 59-29a01

59-29a01. Commitment of sexually violent predators; legislative findings.

The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto, which is intended to provide short-term treatment to individuals with serious mental disorders and then return them to the community. In contrast to persons appropriate for civil commitment under K.S.A. 59-2901 et seq. and amendments thereto, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sexually violent predators likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment procedure pursuant to the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto is inadequate to address the risk these sexually violent predators pose to society. The legislature further finds that the prognosis for rehabilitating sexually violent predators in a prison setting is poor, the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the treatment act for mentally ill persons defined in K.S.A. 59-2901 et seq. and amendments thereto, therefore a civil commitment procedure for the long-term care and treatment of the sexually violent predator is found to be necessary by the legislature.
History: L. 1994, ch. 316, 1; May 19.

K.S.A. 59-29a02

59-29a02. Same; definitions.

As used in this act:
(a) ``Sexually violent predator" means any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence, if not confined in a secure facility.
(b) ``Mental abnormality" means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.
(c) ``Predatory" means acts directed towards strangers or individuals with whom relationships have been established or promoted for the primary purpose of victimization.
(d) ``Sexually motivated" means that one of the purposes for which the defendant committed the crime was for the purpose of the defendant's sexual gratification.

(e) ``Sexually violent offense" means: (1) Rape as defined in K.S.A. 21-3502 and amendments thereto;
(2) indecent liberties with a child as defined in K.S.A. 21-3503 and amendments thereto;
(3) aggravated indecent liberties with a child as defined in K.S.A. 21-3504 and amendments thereto;
(4) criminal sodomy as defined in subsection (a)(2) and (a)(3) of K.S.A. 21-3505 and amendments thereto;
(5) aggravated criminal sodomy as defined in K.S.A. 21-3506 and amendments thereto;
(6) indecent solicitation of a child as defined in K.S.A. 21-3510 and amendments thereto;
(7) aggravated indecent solicitation of a child as defined in K.S.A. 21-2511 and amendments thereto;
(8) sexual exploitation of a child as defined in K.S.A. 21-3516 and amendments thereto;
(9) aggravated sexual battery as defined in K.S.A. 21-3518 and amendments thereto;
(10) any conviction for a felony offense in effect at any time prior to the effective date of this act, that is comparable to a sexually violent offense as defined in subparagraphs (1) through (9) or any federal or other state conviction for a felony offense that under the laws of this state would be a sexually violent offense as defined in this section;
(11) an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 21-3301, 21-3302 and 21-3303, and amendments thereto, of a sexually violent offense as defined in this subsection; or
(12) any act which either at the time of sentencing for the offense or subsequently during civil commitment proceedings pursuant to this act, has been determined beyond a reasonable doubt to have been sexually motivated.
(f) ``Agency with jurisdiction" means that agency which releases upon lawful order or authority a person serving a sentence or term of confinement and includes the department of corrections, the department of social and rehabilitation services and the Kansas parole board.
History: L. 1994, ch. 316, 2; L. 1995, ch. 193, 1; May 4.

K.S.A. 59-29a05

59-29a05. Same; determination of probable cause; evaluation; person taken into custody.

(a) Upon filing of a petition under K.S.A. 59-29a04, the judge shall determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If such determination is made, the judge shall direct that person be taken into custody.
(b) Within 72 hours after a person is taken into custody pursuant to subsection (a), such person shall be provided with notice of, and an opportunity to appear in person at, a hearing to contest probable cause as to whether the detained person is a sexually violent predator. At this hearing the court shall: (1) Verify the detainer's identity; and (2) determine whether probable cause exists to believe that the person is a sexually violent predator. The state may rely upon the petition and supplement the petition with additional documentary evidence or live testimony.
(c) At the probable cause hearing as provided in subsection (b), the detained person shall have

the following rights in addition to the rights previously specified: (1) To be represented by counsel; (2) to present evidence on such person's behalf; (3) to cross-examine witnesses who testify against such person; and (4) to view and copy all petitions and reports in the court file.
(d) If the probable cause determination is made, the court shall direct that the person be transferred to an appropriate secure facility, including, but not limited to, a county jail, for an evaluation as to whether the person is a sexually violent predator. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination.
History: L. 1994, ch. 316, 5; L. 1995, ch. 193, 4; May 4.

K.S.A. 59-29a06

59-29a06. Same; trial; counsel and experts; indigent persons; jury.

Within 60 days after the completion of any hearing held pursuant to K.S.A. 59-29a05 and amendments thereto, the court shall conduct a trial to determine whether the person is a sexually violent predator. The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and when the respondent will not be substantially prejudiced. At all stages of the proceedings under this act, any person subject to this act shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist such person. Whenever any person is subjected to an examination under this act, such person may retain experts or professional persons to perform an examination of such person's behalf. When the person wishes to be examined by a qualified expert or professional person of such person's own choice, such examiner shall be permitted to have reasonable access to the person for the purpose of such examination, as well as to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court, upon the person's request, shall determine whether the services are necessary and reasonable compensation for such services. If the court determines that the services are necessary and the expert or professional person's requested compensation for such services is reasonable, the court shall assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person's behalf. The court shall approve payment for such services upon the filing of a certified claim for compensation supported by a written statement specifying the time expended, services rendered, expenses incurred on behalf of the person and compensation received in the same case or for the same services from any other source. The person, the attorney general, or the judge shall have the right to demand that the trial be before a jury. Such demand for the trial to be before a jury shall be filed, in writing, at least four days prior to trial. Number and selection of jurors shall be determined as provided in K.S.A. 22-3403, and amendments thereto. If no demand is made, the trial shall be before the court.
History: L. 1994, ch. 316, 6; L. 1995, ch. 193, 5; May 4.

K.S.A. 59-29a07

59-29a07. Same; determination; commitment procedure.

(a) The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If such determination that the person is a sexually violent predator is made by a jury, such determination shall be by unanimous verdict of such jury. Such determination may be appealed. If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the secretary of social and rehabilitation services for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large. Such control, care and treatment shall be provided at a facility operated by the department of social and rehabilitation services. At all times, persons committed for control, care and treatment by the department of social and rehabilitation services pursuant to this act shall be kept in a secure facility and such persons shall be segregated at all times from any other patient under the supervision of the secretary of social and rehabilitation services and commencing June 1, 1995, such persons committed pursuant to this act shall be kept in a facility or building separate from any other patient under the supervision of the secretary. The department of social and rehabilitation services is authorized to enter into an interagency agreement with the department of corrections for the confinement of such persons. Such persons who are in the confinement of the secretary of corrections pursuant to an interagency agreement shall be housed and managed separately from offenders in the custody of the secretary of corrections, and except for occasional instances of supervised incidental contact, shall be segregated from such offenders. If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct the person's release. Upon a mistrial, the court shall direct that the person be held at an appropriate secure facility, including, but not limited to, a county jail, until another trial is conducted. Any subsequent trial following a mistrial shall be held within 90 days of the previous trial, unless such subsequent trial is continued as provided in K.S.A. 59-29a06 and amendments thereto.

(b) If the person charged with a sexually violent offense has been found incompetent to stand trial, and is about to be released pursuant to K.S.A. 22-3305 and amendments thereto, and such person's commitment is sought pursuant to subsection (a), the court shall first hear evidence and determine whether the person did commit the act or acts charged. The hearing on this issue must comply with all the procedures specified in this section. In addition, the rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply. After hearing evidence on this issue, the court shall make specific findings on whether the person did commit the act or acts charged, the extent to which the person's incompetence or developmental disability affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on such person's own behalf, the extent to which the evidence could be reconstructed without the assistance of the person and the strength of the prosecution's case. If after the conclusion of the hearing on this issue, the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, the court shall enter a final order, appealable by the person, on that issue, and may proceed to consider whether the person should be committed pursuant to this section.

History: L. 1994, ch. 316, 7; L. 1995, ch. 193, 6; May 4.

K.S.A. 59-29a08

59-29a08. Same; annual examinations; discharge petitions by persons committed under this act over the secretary's objection at time of annual examination, procedure.

Each person committed under this act shall have a current examination of the person's mental condition made once every year. The person may retain, or if the person is indigent and so requests the court may appoint a qualified professional person to examine such person, and such expert or professional person shall have access to all records concerning the person. The yearly report shall be provided to the court that committed the person under this act. The court shall conduct an annual review of the status of the committed person. Nothing contained in this act shall prohibit the person from otherwise petitioning the court for discharge at this hearing. The secretary of the department of social and rehabilitation services shall provide the committed person with an annual written notice of the person's right to petition the court for release over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall forward the notice and waiver form to the court with the annual report. The committed person shall have a right to have an attorney represent the person at the hearing but the person is not entitled to be present at the hearing. If the court at the hearing determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be at large and will not engage in acts of sexual violence if discharged, then the court shall set a hearing on the issue. At the hearing, the committed person shall be entitled to be present and entitled to the benefit of all constitutional protections that were afforded the person at the initial commitment proceeding. The attorney general shall represent the state and shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person shall also have the right to have experts evaluate the person on the person's behalf and the court shall appoint an expert if the person is indigent and requests an appointment. The burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is not safe to be at large and if released is likely to engage in acts of sexual violence.
History: L. 1994, ch. 316, 8; L. 1995, ch. 193, 7; May 4.

K.S.A. 59-29a09-29a11

59-29a09. Detention and commitment to conform to constitutional requirements.

The involuntary detention or commitment of persons under this act shall conform to constitutional requirements for care and treatment.
History: L. 1994, ch. 316, 9; May 19.

59-29a10. Petition for release; procedure.

If the secretary of the department of social and rehabilitation services determines that the person's mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence if released, the secretary shall authorize the person to petition the court for release. The petition shall be served upon the court and the attorney general. The court, upon receipt of the petition for release, shall order a hearing within 30 days. The attorney general shall represent the state, and shall have the right to have the petitioner examined by an expert or professional person of such attorney's choice. The hearing shall be before a jury if demanded by either the petitioner or the attorney general. The burden of proof shall be upon the attorney general to show beyond a reasonable doubt that the petitioner's mental abnormality or personality disorder remains such that the petitioner is not safe to be at large and that if discharged is likely to commit predatory acts of sexual violence.
History: L. 1994, ch. 316, 10; L. 1995, ch. 193, 8; May 4.

59-29a11. Same; subsequent discharge petitions, limitations.

Nothing in this act shall prohibit a person from filing a petition for discharge pursuant to this act. However, if a person has previously filed a petition for discharge without the secretary of the department of social and rehabilitation services approval and the court determined either upon review of the petition or following a hearing, that the petitioner's petition was frivolous or that the petitioner's condition had not so changed that the person was safe to be at large, then the court shall deny the subsequent petition unless the petition contains facts upon which a court could find the condition of the petitioner had so changed that a hearing was warranted. Upon receipt of a first or subsequent petition from committed persons without the secretary's approval, the court shall endeavor whenever possible to review the petition and determine if the petition is based upon frivolous grounds and if so shall deny the petition without a hearing.
History: L. 1994, ch. 316, 11; May 19.

K.S.A. 59-2929

59-2929. Rights of patients. (a) Every patient being treated in any treatment facility, in addition to all other rights preserved by the provisions of this act, shall have the following rights:

(1) To wear the patient's own clothes, keep and use the patient's own personal possessions including toilet articles and keep and be allowed to spend the patient's own money;
(2) to communicate by telephone, both to make and receive confidential calls, and by letter, both to mail and receive unopened correspondence, except that if the head of the treatment facility should deny a patient's right to mail or to receive unopened correspondence under the provisions of subsection (b), such correspondence shall be opened and examined in the presence

of the patient;
(3) to conjugal visits if facilities are available for such visits;
(4) to receive visitors each day;
(5) to refuse involuntary labor and to be paid for any work performed other than the housekeeping of the patient's own bedroom and bathroom subject to the provisions of K.S.A. 1993 Supp. 59-2943;
(6) not to be subject to such procedures as psychosurgery, electroshock therapy, experimental medication, aversion therapy or hazardous treatment procedures without the written consent of the patient and the written consent of a parent, guardian or other person in loco parentis, if such patient has a living parent or a guardian or other person in loco parentis;
(7) to have explained, the nature of all medications prescribed, the reason for the prescription and the most common side effects and, if requested, the nature of any other treatments ordered;
(8) to communicate by letter with the secretary of social and rehabilitation services, the head of the treatment facility and any court, physician, psychologist, minister of religion, including Christian Science practitioner or attorney. All such communications shall be forwarded at once to the addressee without examination and communications from such persons shall be delivered to the patient without examination;
(9) to be visited by the patient's physician, psychologist, minister of religion, including Christian Science practitioner or attorney at any time; and
(10) to be informed orally and in writing of the patient's rights under this section upon admission to a treatment facility.
(b) The head of the treatment facility may, for good cause only, restrict a patient's rights under this section, except that the rights enumerated in subsections (a)(5) through (a)(10), and the right to mail any correspondence which does not violate postal regulations, shall not be restricted by the head of the treatment facility under any circumstances. Each treatment facility shall adopt regulations governing the conduct of all patients being treated in such treatment facility, which regulations shall be consistent with the provisions of this section. A statement explaining the reasons for any restriction of a patient's rights shall be immediately entered on such patient's medical record and copies of such statement shall be available to the patient and the parent, guardian or person in loco parentis, if such patient is less than 18 years of age, and the patient's attorney. In addition, notice of any restriction of a patient's rights shall be communicated to such persons in a timely fashion.
(c) Any person willfully depriving any patient of the rights protected by this section, except for the restriction of such rights in accordance with the provisions of subsection (b), shall be guilty of a class C misdemeanor.
History: L. 1965, ch. 348, 29; L. 1976, ch. 243, 32; L. 1986, ch. 211, 23; July 1.

K.S.A. 59-2924

59-2924. Transfer; discharge; conditional release. (a) The secretary of social and rehabilitation services or the secretary's designee may transfer any patient from any state psychiatric hospital under the secretary's control to any other state psychiatric hospital whenever the secretary or the

secretary's designee considers it to be in the best interests of the patient. Except in the case of an emergency, the patient's next of kin or guardian, if one has been appointed, shall be notified of the transfer, and notice shall be sent to the committing court not less than 14 days before the proposed transfer. The notice shall state the location to which the transfer is proposed and state that, upon request of the next of kin or guardian, an opportunity for a hearing on the proposed transfer will be provided by the secretary of social and rehabilitation services prior to such transfer.

(b) The secretary of social and rehabilitation services or the designee of the secretary may transfer any involuntary patient from any state psychiatric hospital to any state institution for the mentally retarded whenever the secretary of social and rehabilitation services or the designee of the secretary considers it to be in the best interests of the patient. Any patient transferred as provided in this subsection shall remain subject to the same statutory provisions as were applicable at the hospital from which the patient was transferred and in addition thereto shall abide by and be subject to all the rules and regulations of the institution to which the patient has been transferred. Except in the case of an emergency, the patient's next of kin or guardian, if one has been appointed, shall be notified of the transfer, and notice shall be sent to the committing court not less than 14 days before the proposed transfer. The notice shall state the location to which the transfer is proposed and state that, upon request of the next of kin or guardian, an opportunity for a hearing on the proposed transfer will be provided by the secretary of social and rehabilitation services prior to such transfer. No involuntary patient shall be transferred from a state psychiatric hospital to a state institution for the mentally retarded unless the superintendent of the receiving institution has found that the patient is mentally retarded and in need of care and training and that placement in the institution is the least restrictive alternative available. Nothing in this subsection shall prevent the secretary of social and rehabilitation services or the designee of the secretary from allowing a person to be admitted as a voluntary resident to a state institution for the mentally retarded, or from discharging such person from a state psychiatric hospital.

(c) When any proposed patient or involuntary patient has been ordered to any treatment facility pursuant to K.S.A. 59-2909, 59-2912, 59-2917 or 59-2918, and amendments thereto, the head of the treatment facility shall discharge the patient when the patient is no longer in need of treatment in the facility, except that no patient shall be discharged from a state psychiatric hospital, if there is a participating mental health center serving the area where the patient intends to reside, without receiving recommendations from such participating mental health center. The head of the treatment facility shall review and investigate all applications for involuntary admission and, if appropriate, shall divert patients to less restrictive treatment alternatives before further judicial proceedings occur whenever it is deemed appropriate by the head of the treatment facility. If diversion from involuntary treatment is not appropriate, the head of the treatment facility should be prepared to present evidence at the next hearing scheduled for the patient concerning further need for involuntary treatment.

(d) The head of the treatment facility may release any involuntary patient who has been committed for treatment pursuant to K.S.A. 59-2917 or 59-2918, and amendments thereto, on conditional release when the head of the treatment facility believes that (1) the release is in the best interests of the patient and (2) the patient is not likely to cause harm to self or others as long as the patient continues a plan of treatment in the community. The treatment facility shall

formulate a plan of treatment for each patient released on conditional release. The plan of treatment may include any conditions which the head of the treatment facility considers to be in the best interests of the patient or necessary to ensure that the patient is not likely to cause harm to self or others. The conditions may include a requirement that the patient be supervised by and report to a treatment facility which shall be responsible for ensuring that the patient complies with the conditions. The treatment facility in the community shall inform the head of the treatment facility from which the patient was discharged of any material noncompliance with the treatment plan. The head of the treatment facility from which the patient is released may change the plan of treatment or the conditions specified in the plan whenever the head considers it to be in the best interests of the patient or necessary to ensure that the patient is not likely to cause harm to self or others. If the patient fails to comply with any conditions of the treatment plan, the head of the facility may revoke the release and order the patient readmitted to the facility. The head of the treatment facility may authorize and order a law enforcement officer or other person to take into custody and transport the patient to a treatment facility.

Prior to the end of the 120 days on conditional release, and not less often than each 120 days thereafter while a patient is on conditional release, the head of the treatment facility from which the patient is released shall reexamine the facts relating to the treatment of the patient on conditional release.

(e) The head of the treatment facility shall not discharge an involuntary patient from conditional release unless at least seven days' notice of the intention to discharge the patient is given to the patient's guardian, if any, and to any other treatment facility which is involved in the treatment plan for the patient.

(f) Nothing in this section shall be construed to amend or modify or repeal any law relating to the confinement of persons charged with or convicted of a criminal offense.

History: L. 1965, ch. 348, 24; L. 1967, ch. 319, 1; L. 1976, ch. 243, 27; L. 1982, ch. 238, 2; L. 1986, ch. 211, 20; L. 1990, ch. 92, 29; Jan. 1, 1991.

K.S.A. 59-2925

59-2925. Notice of discharge or conditional release. The head of the treatment facility shall notify, in writing, the patient, the patient's attorney and the district court, which has ordered the treatment of the involuntary patient or the district court which has jurisdiction of the patient or the, referral of the proposed patient, of the patient's discharge or conditional release. When a notice of discharge is received, the court shall file the same in the record, which shall terminate the proceedings. When a notice of conditional release is received, the court shall file it in the records.

History: L. 1965; ch. 348, 25; L. 1976, ch. 243, 28; L. 1976, ch. 242, 80; L. 1982, ch. 238, 3; July 1.

59-2926.

APPENDIX B

Various Kansas Statutes Cited in Brief

K.S.A. 21-3503

21-3503. Indecent liberties with a child. (1) Indecent liberties with a child is engaging in any of the following acts with a child who is not married to the offender and who is under 16 years of age:

(a) Sexual intercourse; or

(b) any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both; or

(c) soliciting the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another.

(2) Indecent liberties with a child is a class C felony.

History: L. 1969, ch. 180, § 21-3503; L. 1975, ch. 193, § 1; L. 1983, ch. 109, § 3; L. 1984, ch. 118, § 1; L. 1985, ch. 109, § 2; L. 1987, ch. 108, § 1; April 16.

K.S.A. 21-4501(c)

21-4501. Classes of felonies and terms of imprisonment. For the purpose of sentencing, the following classes of felonies and terms of imprisonment authorized for each class are established:

(c) Class C, the sentence for which shall be an indeterminate term of imprisonment, the minimum of which shall be fixed by the court at not less than three years nor more than five years and the maximum of which shall be fixed by the court to not less than 10 years nor more than 20 years.

K.S.A. 21-4504(b)

21-4504. Conviction of second and subsequent felonies; exceptions.

(b) If a defendant is convicted of a felony a third or subsequent time, the trial judge shall sentence the defendant as follows, upon motion of the prosecuting attorney:

(1) The court shall fix a minimum sentence of not less than the greatest nor more than three times the greatest minimum sentence authorized by K.S.A. 21-4501 and amendments thereto, for the crime for which the defendant is convicted; and

(2) the court may fix a maximum sentence of not less than the least nor more than three times the greatest maximum sentence provided by K.S.A. 21-4501 and amendments therto, for the crime.

History: L. 1969, ch. 180, § 21-4504; L. 1970, ch. 124, § 10; L. 1973, ch. 141, § 1; L. 1978, ch. 120, § 4; L. 1982, ch. 137, § 2; July 1.

K.S.A. 21-4608

21-4608. Multiple sentences. (1) When separate sentences of imprisonment for different crimes are imposed on a defendant on the same date, including sentences for crimes for which suspended sentences, probation or assignment to a community correctional services program have been revoked, such sentences shall run concurrently or consecutively as the court directs. Whenever the record is silent as to the manner in which two or more sentences imposed at the same time shall be served, they shall be served concurrently, except as provided in subsections (3), (4) and (5).

(2) Any person who is convicted and sentenced for a crime committed while on probation, assignment to a community correctional services program, parole or conditional release for a misdemeanor shall serve the sentence concurrently with or consecutively to the term or terms under which the person was on probation, assigned to a community correctional services program or on parole or conditional release, as the court directs.

(3) Any person who is convicted and sentenced for a crime committed while on probation, assigned to a community correctional services program, on parole, on conditional release for a felony shall serve the sentence consecutively to the term or terms under which the person was on probation, assigned to a community correctional services program or on parole or conditional release.

(4) Any person who is convicted and sentenced for a crime committed while on release for a felony pursuant to article 28 of chapter 22 of the Kansas Statutes Annotated shall serve the sentence consecutively to the term or terms under which the person was released.

(5) Any person who is convicted and sentenced for a crime committed while such person is incarcerated and serving a sentence for a felony in any place of incarceration shall serve the sentence consecutively to the term or terms under which the person was incarcerated.

(6) The provisions of this subsection relating to parole eligibility shall be applicable to persons convicted of crimes committed prior to January 1, 1979, but shall be applicable to persons convicted of crimes committed on or after that date only to the extent that the terms of this subsection are not in conflict with the provisions of K.S.A. 22-3717 and amendments thereto. In calculating the time to be served on concurrent and consecutive sentences, the following rules shall apply:

(a) When indeterminate terms run concurrently, the shorter minimum terms merge in and are satisfied by serving the longest minimum term and the shorter maximum terms merge in and are satisfied by conditional release or discharge on the longest maximum term if the terms are imposed on the same date.

(b) When concurrent terms are imposed on different dates, computation will be made to determine which term or terms require the longest period of imprisonment to reach parole eligibility, conditional release and maximum dates, and that sentence will be considered the controlling sentence. The parole eligibility date may be computed and projected on one sentence and the conditional release date and maximum may be computed and projected from another to determine the controlling sentence.

(c) When indeterminate terms imposed on the same date are to be served consecutively, the minimum terms are added to arrive at an aggregate minimum to be served equal to the sum of all minimum terms and the maximum terms are added to arrive at an aggregate maximum equal to

the sum of all maximum terms.

(d) When indeterminate sentences are imposed to be served consecutively to sentences previously imposed in any other court or the sentencing court, the aggregated minimums and maximums shall be computed from the effective date of the subsequent sentences which have been imposed as consecutive. For the purpose of determining the sentence begins date and the parole eligibility and conditional release dates, the inmate shall be given credit on the aggregate sentence for time spent imprisoned on the previous sentences, but not exceeding an amount equal to the previous minimum sentence less the maximum amount of good time credit that could have been earned on the minimum sentence. For the purpose of computing the maximum date, the inmate shall be given credit for all time spent imprisoned on the previous sentence. This method for computation of the maximum sentence shall be utilized for all sentences computed pursuant to this subsection after July 1, 1983.

Nothing in this subsection (6)(d) shall affect the authority of the Kansas parole board to determine the parole eligibility of inmates pursuant to subsection (d) of K.S.A. 22-3717 and amendments thereto.

(e) When consecutive sentences are imposed which are to be served consecutive to sentences for which a prisoner has been on probation, assigned to a community correctional services program, on parole or on conditional release, the amount of time served on probation, assigned to a community correctional services program, on parole or on conditional release shall not be credited as service on the aggregate sentence in determining the parole eligibility, conditional release and maximum dates.

(7) When a definite and an indefinite term run consecutively, the period of the definite term is added to both the minimum and maximum of the indeterminate term and both sentences are satisfied by serving the indeterminate term.

(8) When a defendant is sentenced in a state court and is also under sentence from a federal court or other state court or is subject to sentence in a federal court or other state court for an offense committed prior to the defendant's sentence in a Kansas state court, the court may direct that custody of the defendant may be relinquished to federal or other state authorities and that such state sentences as are imposed may run concurrently with any federal or other state sentence imposed.

History: L. 1969, ch. 180, § 21-4608; L. 1978, ch. 120, § 8; L. 1982, ch. 150, § 1; L. 1983, ch. 111, § 1; L. 1985, ch. 111, § 1; L. 1986, ch. 123, § 9; L. 1987, ch. 113,§ 1; May 7.

K.S.A. 22-3429

22-3429. Deferring sentence pending mental examination. After conviction and prior to sentence and as part of the presentence investigation authorized by K.S.A. 21-4604, the trial judge may order the defendant committed to a state hospital or any suitable local mental health facility for mental examination, evaluation and report. If adequate private facilities are available and if the defendant is willing to assume the expense thereof such commitment may be to a private hospital. A report of the examination and evaluation shall be furnished to the judge and shall be made available to the prosecuting attorney and counsel for the defendant. A defendant may not

be detained for more than 120 days under a commitment made under this section.
History: L. 1970, ch. 129, 22-3429; July 1.

K.S.A. 22-3430

22-3430. Commitment to certain state institutions, when; costs; order of commitment; appeal. If the report of the examination authorized by the preceding section shows that the defendant is in need of psychiatric care and treatment and that such treatment may materially aid in his rehabilitation and that the defendant and society is not likely to be endangered by permitting the defendant to receive such psychiatric care and treatment, in lieu of confinement or imprisonment, the trial judge shall have power to commit such defendant to any state or county institution provided for the reception, care, treatment and maintenance of mentally ill persons. The court may direct that the defendant be detained in such institution until further order of the court or until the defendant is discharged under K.S.A. 22-3431. No period of detention under this section shall exceed the maximum term provided by law for the crime of which the defendant has been convicted. The trial judge shall, at the time of such commitment, make an order imposing liability upon the defendant, or such person or persons responsible for the support of the defendant, or upon the county or the state, as may be proper in such case, for the cost of admission, care and discharge of the defendant.

The defendant may appeal from any order of commitment made pursuant to this section in the same manner and with like effect as if sentenced to a jail, or to the custody of the director of penial institutions had been imposed in this case.
History: L. 1970, ch. 129, 22-3430; July 1.

K.S.A. 22-3431

22-3431. Disposition upon completion of treatment. Whenever it appears to the chief medical officer of the institution to which a defendant has been committed under K.S.A. 22-3430 and amendments thereto, that such person is not dangerous to self or others and that such person will not be improved by further detention in such institution, such person shall be returned to the court where convicted and shall be sentenced, committed, granted probation, assigned to a community correctional services program or discharged as the court deems best under the circumstances. The time spent in a state or county institution pursuant to a commitment under K.S.A. 22-3430 and amendments thereto shall be credited against any sentence, confinement or imprisonment imposed on the defendant.
History: L. 1970, ch. 129, 22-3431; L. 1971, ch. 114, 8; L. 1986, ch. 123, 22; July 1.

K.S.A. 22-3717(a)(c)(1)

22-3717. Parole eligibility; release, when; hearings; rules and regulations; conditions of parole.

(a) Except as otherwise provided by this section, an inmate, including an inmate sentenced pursuant to K.S.A. 21-4618 and amendments thereto, shall be eligible for parole after serving the entire minimum sentence imposed by the court, less good time credits.
(c) Except as provided in subsection (d), if an inmate is sentenced to imprisonment for more than one crime and the sentences run consecutively, the inmate shall be eligible for parole after serving the total of:
(1) The aggregate minimum sentences, as determined pursuant to K.S.A. 21-4608 and amendments thereto, less good time credits for those crimes which are not class A felonies; and

History: L. 1970, ch. 129, 22-3717; L. 1972, ch. 317, 90; L. 1973, ch. 339, 88; L. 1974, ch. 403, 10; L. 1975, ch. 203, 1; L. 1976, ch. 168, 2; L. 1978, ch. 120, 13; L. 1979, ch. 94, 2; L. 1981, ch. 156, 1; L. 1982, ch. 137, 3; L. 1982, ch. 150, 2; L. 1983, ch. 116, 1; L. 1984, ch. 131, 1; L. 1985, ch. 111, 2; L. 1986, ch. 128, 3; L. 1986, ch. 123, 25; L. 1986, ch. 136, 3; L. 1987, ch. 118, 1; L. 1988, ch. 115, 1; May 19.

K.S.A. 22-3718

22-3718. Conditional release.
An inmate who has served the inmate's maximum term or terms, less such work and good behavior credits as have been earned, shall, upon release, be subject to such written rules and conditions as the Kansas parole board may impose, until the expiration of the maximum term or terms for which the inmate was sentenced or until the inmate is otherwise discharged. If the court which sentenced an inmate specified at the time of sentencing the amount and the recipient of any restitution ordered as a condition of release pursuant to this section, the parole board shall order as a condition of release that the inmate pay restitution in the amount and manner provided in the Journal Entry unless the board finds compelling circumstances which would render a plan of restitution unworkable. If the inmate was sentenced before July 1, 1986, and the court did not specify at the time of sentencing the amount and the recipient of any restitution ordered as a condition of release, the parole board shall order as a condition of release that the inmate make restitution for the damage or loss caused by the inmate's crime in an amount and manner determined by the board unless the board finds compelling circumstances which would render a plan of restitution unworkable. If the inmate was sentenced on or after July 1, 1986, and the court did not specify at the time of sentencing the amount and the recipient of any restitution ordered as a condition of release pursuant to this section, the parole board shall not order restitution as a condition of release unless the board finds compelling circumstances which justify such an order.
History: L. 1970, ch. 129, 22-3718; L. 1972, ch. 317, 91; L. 1986, ch. 128, 4; July 1.

K.S.A. 22-3725

22-3725. Good time credits. (a) For the purpose of determining an inmate's eligibility for parole or conditional release, regardless of when the inmate was sentenced or committed the crime for

which sentenced, good time credits shall be allocated as follows:

GOOD TIME TABLE

(Assumed 360-Day Years, 30-Day Months)

SENTENCE	GOOD TIME EARNED			MUST SERVE		
Minimum (or) Maximum	Years	Months	Days	Years	Months	Days
5	2	0	0	3	0	0
20	9	6	0	10	6	0
45	22	0	0	23	0	0
80	39	6	0	40	6	0
100	49	6	0	50	6	0

(b) Maximum good time credits for sentences of less than two years shall be computed as follows: One day for every three days served and one month for every year served.

(c) Maximum good time credits for sentences greater than two years shall be computed as follows: One-half of the sentence less six months.

(d) Good time credits shall be awarded on an earned basis pursuant to rules and regulations adopted by the secretary of corrections.
History: L. 1988, ch. 115, 2; May 19.

K.S.A. 21-4716(a)(2)(G)(ii)
21-4716. Imposition of presumptive sentence; departure sentencing; finding substantial and compelling reasons for departure; mitigating or aggravating factor considered in determining if reasons exist; reasons stated on record. (a) The sentencing judge shall impose the presumptive sentence provided by the sentencing guidelines for crimes committed on or after July 1, 1993, unless the judge finds substantial and compelling reasons to impose a departure. If the sentencing judge departs from the presumptive sentence, the judge shall state on the record at the time of sentencing the substantial and compelling reasons for the departure.
(2) Subject to the provisions of subsection (b)(3), the following nonexclusive list of aggravating factors may be considered in determining whether substantial and compelling reasons for departure exist:

(G) The defendant's current crime of conviction is a crime of extreme sexual violence and the

defendant is a predatory sex offender. As used in this subsection:
(ii) "Predatory sex offender" is an offender who has been convicted of a crime of extreme sexual violence as the current crime of conviction and who:
(a) Has one or more prior convictions of any crimes of extreme sexual violence. Any prior conviction used to establish the defendant as a predatory sex offender pursuant to this subsection shall also be counted in determining the criminal history category; or
(b) suffers from a mental condition or personality disorder which makes the offender likely to engage in additional acts constituting crimes of extreme sexual violence.
History: L. 1992, ch. 239, 16; L. 1993, ch. 291, 263; Amended, L. 1994, ch. 341, 2; July 1.

APPENDIX C

Direct Examination of Dr. Charles Befort
from Habeas Corpus Hearing.

Pawnee County District Court
Case No. 95 C 55

MR. WEILERT: Your Honor, I don't believe they're as specific as is required by the code of civil procedure, but they do have a general denial.

THE COURT: And they're verified.

MR. WEILERT: Yes.

THE COURT: Are you ready to proceed?

MR. WEILERT: Yes, Your Honor.

THE COURT: You may proceed.

MR. WEILERT: Thank you, Your Honor. We would call Charles Befort.

CHARLES BEFORT,

called as a witness in behalf of the Petitioners, being of legal age and after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WEILERT:

Q. Would you tell us your name and occupation please, sir?

A. My name is Charles Befort; I'm chief psychologist at Larned State Hospital.

Q. And Dr. Befort, we've met a few times before, haven't we?

A. Yes, we have.

Q. I'd like to go back to the period of time before we first met, say to about July of 1994, can you tell

us what your occupation was at that time?
A. Same occupation.
Q. Okay. And as I recall, you were the chief psychologist and that included work at both the Larned State Hospital and the State Security Hospital?
A. That's right.
Q. And this once again we're talking about approximately July of 1994, those were or that was a full-time position, was it not?
A. Yes.
Q. And did you have any difficulty at all in filling up your 40 or 50 or 60 hours a week?
A. Not at all.
Q. Can you tell us something about your educational background, sir?
A. I have a doctor of philosophy degree in psychology from Oklahoma State University.
Q. And you have been a licensed psychologist for how long, sir?
A. Since about 1971.
Q. And it's my understanding that you did not have any type of internship or fellowship in the treatment of sexual offenders, is that right?
A. That's right.

Q. And your employment since obtaining your PhD has been at Larned State Hospital, has it not?
A. Yes. And I also work in a mental health center one day a week.
Q. You told me where that was and I don't remember.
A. Greensburg.
Q. The Iroquois Center I believe?
A. That's right.
Q. Now, before July of 1994 then, would it be correct to say that you did not have any specialized advanced training in the treatment of sex offenders?
A. That's correct.
Q. In, I believe it was September of 1994, I along with some other lawyers took your deposition in Mr. Hendricks' case and the case of Richard Beam, is that right?
A. That's right.
Q. And that was at the district attorney's office in Wichita?
A. Yes.
Q. Now, during the course of that deposition you testified that in your opinion you were not qualified to be a director of a sexual treatment program, is that right?
A. I can't remember, but that's probably what I would

testify to.
Q. So here today you feel that you're not qualified to be a director of a sexual treatment program?
A. I am more qualified than I was a year ago, yes.
Q. Okay. The fact remains though that in your personal opinion, you don't, still don't think you're qualified, do you?
A. Not fully.
Q. Now, in, I believe in that same deposition and at times later, you have given some information as to what you felt a sexual treatment program ought to contain, is that correct?
A. I gave that in a deposition a couple of weeks ago.
Q. Okay.
A. That what you're referring to?
Q. That plus I think some others but we'll stick with the one a couple of weeks ago. That was August 16th in Wichita, wasn't it?
A. Yes.
Q. And that was in the case of State of Kansas versus Jack Spratt?
A. Yes.
Q. And in that deposition you talked about the fact that there were no clinical people giving any treatment to the persons confined in the sexual

treatment program at the Larned mental health facility, is that right?
A. Except for me, yes.
Q. Now, in your position as of August 16th of 1995, just a couple weeks ago, you, I believe, said that the offender or pardon me, the people in the sexual treatment program were receiving essentially no treatment; do you recall saying that?
A. Yes.
Q. And that's a true statement, is it not?
A. I believe so.
Q. Are you familiar with a sexual predator treatment program composition which it's my understanding was prepared by Janet McClellan and for the sexual treatment program at Larned?
A. It's been sometime ago, I remember putting it together, yes.
Q. Did you assist in putting that together?
A. Not a great deal, mostly looked it over, checked it for internal consistency and also just to educate myself as to what was in there.
Q. Okay. Who put that treatment program proposal together?
A. I think Ms. McClellan did most of that.
Q. Would it be fair to say that the treatment program

in your opinion as a psychologist should include persons who have an expertise in the psychological and psychiatric fields?

A. Yes.

Q. And would it be your opinion that the director of that program should have expertise in those areas?

A. Not necessarily.

Q. Should there be a, if the director of the program does not have that expertise, should the person in charge of the actual clinical department have that expertise?

A. Yes.

Q. And you've testified that you feel you do not have that expertise, is that correct?

A. Not entirely, that's right.

Q. Now Ms. McClellan, do you know anything about her educational background?

A. Some.

Q. She has degrees, I believe in relating to business and law enforcement, does she not?

A. Yes.

Q. Doesn't have any training in psychology or psychiatry, does she?

A. Not that I know of.

Q. The document that we just spoke of, the sexual

predator treatment program composition, it lists several items that are in bold face required characteristics. One of the required characteristics, number three, is that the program must have adequate staffing in terms of numbers, quantifications and gender representation. Now the sexual treatment program at Larned doesn't have that, does it?

A. Not at this time.

Q. The fourth one is it says that the program must have adequate funding, not only for the necessary and required staff, but for materials, equipment, staff training, resident treatment and education, and for adequate space to carry out its assigned tasks. The program at Larned doesn't have that, does it?

A. I think it has all that. It has plenty of funding and we have lots of space.

Q. You don't have the materials and equipment that you would consider necessary in a sexual treatment program though, do you?

A. I think we have most of it, not all of it.

Q. What don't you have?

A. I don't know if we have the plethysmograph lab in place, I don't know if we have the equipment yet. We're going to have a polygraph lab and I believe

we're still waiting for that. We do have plenty of testing materials and books and videotapes and so forth and we can get whatever we need.

Q. So you have some of that but not all of it?

A. Quite a bit.

Q. In, I believe it was October of 1994, Mr. Hendricks was admitted to the sexual treatment program, is that correct?

A. That's probably right.

Q. And at the time Mr. Hendricks was admitted, actually before that time, you had done an evaluation of Mr. Hendricks, haven't you?

A. Yes.

Q. And you testified at his commitment hearing?

A. Yes.

Q. And at least to a significant degree, your testimony is what resulted in him being committed, isn't that correct?

A. I assume that.

Q. You were the only psychologist who testified on behalf of the state that offered any opinion as to Mr. Hendricks, whether or not he was a sexual predator as defined by the statute?

A. As I recall, that's correct.

Q. You recognize, do you not, sir, that that creates a

significant barrier for you being an effective treatment giver?

A. Yes.

Q. And that's a widely recognized premise in the psychological and psychiatric fields, isn't it?

A. I believe so.

Q. And up until this time you're the only psychologist or psychiatrist that Mr. Hendricks has had any contact with, aren't you? In the sexual treatment program?

A. That's correct.

Q. For the reasons you just stated, would you agree that it would be extremely difficult, if not impossible, for you to give effective treatment to Mr. Hendricks?

A. I assume that, with respect to certain issues, yes.

Q. In fact, those are the, for lack of a better term, the sexual issues that cause him to be here, right?

A. Sexual deviant, yes.

Q. I didn't have a chance to go through a lot of them, but in whatever that big blue book is, it's kind of a history of Mr. Hendricks since he arrived in Larned back in October of '94, for the first several months of that history, your name appears very sporadically, and is that because you saw Mr.

Hendricks very sporadically?
A. That's true.
Q. And that was because you were involved with your other full-time job, right?
A. Right. At that point I was simply consulting psychologist for SRS.
Q. And then at what point did you become the, I believe you're the acting clinical director, is that right?
A. Temporary acting clinical director something, anyway since March the 20th.
Q. And since March the 20th then, pardon me, before March the 20th, did Mr. Hendricks receive any treatment dealing with the sexual deviancy issues that brought him here?
A. Probably a little provided by Mr. Wright.
Q. And who is Mr. Wright?
A. Mr. Wright's a person with a psychology degree who used to be on staff and he saw Mr. Hendricks in individual sessions.
Q. Was that a bachelor's degree in psychology?
A. Master's degree.
Q. Master's degree? And who was supervising him?
A. As a consulting psychologist, he did connect with me quite a bit. We didn't spend a lot of time going over those specifics, though, he just took it from

there, flew by the seat of his pants.
Q. Now correct me if I am wrong, but isn't the law in the State of Kansas regarding master's level psychologist is that they are required to work under the direction of a PhD level psychologist?
A. He wasn't functioning as a psychologist formally.
Q. What was he functioning as?
A. A forensic counselor or forensic specialist, some title.
Q. So something below a master's level psychologist and something below a licensed clinical social worker?
A. Yes.
Q. How long was Mr. Wright on staff?
A. He was one of the first folks on staff, in the summer or early fall, and I believe he left employment in March this year. That's my best recollection.
Q. Okay. So other than whatever contact you had with Mr. Wright, that was the only treatment he got up until March of '95.
A. Basically in terms of counseling, right.
Q. I notice there are some references in Mr. Hendricks' record to some group sessions, notations that you have made?
A. Yes.

Q. Now am I correct, sir, that those group sessions are not dealing with sexual deviancy issues at this point?
A. A few times it may have come up, depending upon what the men wanted to discuss. But for the most part, no.
Q. They're primarily dealing, for lack of a better term, kind of a group session about the fact that there aren't any treatment programs in place, isn't that correct?
A. That has been a gripe, yes.
Q. It's been a consistent gripe throughout your period as acting clinical director, hasn't it?
A. Pretty well.
Q. And basically your response during those sessions has been something along the lines of we're working on it, we're trying to get something in place, that type of thing?
A. Yes.
Q. Now, Mr. Hendricks has been here for about ten months now, right?
A. Yes.
Q. You have had occasion to read the sexual predator law on more than one occasion I'm sure?
A. Yes.

Q. And you know that it requires an annual report to the court?
A. Yes.
Q. Who's going to prepare that report for Mr. Hendricks in October?
A. I don't know. I assume I will.
Q. Now, in making that report, you're going to have to tell the court that he has had no opportunity for meaningful treatment, aren't you?
A. Yes.
Q. And in making a report of that type, you are effectively denying Leroy any possible chance for release in October of 1995, aren't you?
A. In terms of following the statute, the requirement that he's no longer dangerous or likely to engage in such behavior, yes, that hasn't been modified and it certainly hasn't been dealt with in treatment.
Q. And the reason it hasn't been dealt with in treatment is because the sexual treatment program at Larned Correctional Mental Health Facility basically doesn't exist outside of you, isn't that correct?
A. In terms of the addressing the sexual deviance, that's essentially correct.
Q. You recognize Mr. Blumenshine?
A. Yes.